In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-666

THE TEWA TESUQUE, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A) is reported at 360 F. Supp. 452. The opinion of the court of appeals (Pet. App. B) is reported at 498 F.2d 240.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1974. A timely petition for rehearing *en banc* was denied on August 5, 1974. On October 25, 1974, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including December 2, 1974. The petition for a writ of certiorari was filed on November 29, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an Indian Tribe was a necessary party to a suit by members of the tribe against federal de-

fendants and a private construction company, seeking to set aside a lease signed by the Tribe and the company and approved by the federal defendants, and also seeking damages.

2. Whether the federal defendants were immune from suit for damages because their actions challenged in the suit were taken as part of their official duties.

STATEMENT

Certain members of the Pueblo of Tesuque (the Pueblo),[1] having formed an organization (the Tewa Tesuque), brought this action against the Secretary of the Interior and certain officers of the Bureau of Indian Affairs (federal respondents) and the Sangre de Cristo Development Company (Sangre), a private company. Plaintiffs sought damages and cancellation of a lease between the Pueblo and Sangre. The lease, under which Sangre would build a housing development on tribal land, was entered into by the Pueblo and Sangre and was approved by the Secretary of the Interior. Although petitioners sought cancellation of the lease they did not make the Pueblo a party to the case. The district court dismissed the suit for failure to include an indispensable party and additionally because of the immunity of the federal officials acting in their official capacity (Pet. App. A). The court of appeals affirmed on the same grounds (Pet. App. B).

ARGUMENT

Petitioners complain that the lease entered into between the Pueblo and Sangre was unfavorable to the Pueblo

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[1]The Pueblo of Tesuque is an Indian tribe governed by a longstanding tribal government recognized by the United States. Its land may not be sold or leased without the approval of the Secretary of the Interior, 25 U.S.C. 415. See Department of the Interior, *Federal Indian Law*, pp. 889-927 (1958); see also *United States* v. *Sandoval*, 231 U.S. 28.

and that the federal defendants as trustees should not have approved the lease (Pet. 7-9). But the constituted government of the Pueblo has not sought to withdraw from the lease or to charge that the United States violated its trust in approving the lease. Nor has the Pueblo been named a party defendant to this suit to cancel its lease although the lease is of Pueblo lands, although the lease was signed by the Pueblo's governing council on behalf of the Pueblo, and although the lease benefits the Pueblo directly through income under the lease and indirectly through job opportunities for the members of the Pueblo (Pet. App. B, p. 3).

1. The courts below properly held that the suit could not proceed without the Pueblo as a party (see Rule 19, Fed. R. Civ. P.). In addition to the possibile adverse effect on the Pueblo if the lease is cancelled, any award of damages to these petitioners would not end the litigation but could lead to additional suits by other members of the Pueblo and by the Pueblo itself. This multiplicity of suits would not serve the policy of the Rules of Civil Procedure of deciding a case as a whole. See *Provident Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 111.

Moreover, petitioners have an adequate remedy elsewhere. If they can convince the tribal council that litigation to cancel the lease is desirable, the Pueblo could join a suit or bring an action on its own behalf, in which event there would be no question of an indispensable party being absent. If unable to convince the Pueblo to join them, petitioners have such rights against the Pueblo as are provided by 25 U.S.C. 1302, the Indian Civil Rights Act. (See Pet. App. B, pp. 4-5.) In light of these circumstances the court of appeals properly applied the considerations set out in

Rule 19(b), Fed. R. Civ. P., in dismissing the suit for failure to join the Pueblo.[2]

2. A separate reason for denying a writ of certiorari is that it would be premature for this Court to consider the environmental issues raised by petitioners as a primary reason for setting aside the lease (Pet. 22-23). The Court of Appeals for the Tenth Circuit in *Davis* v. *Morton*, 469 F.2d 593, held that the Secretary of the Interior's approval of the lease in question here was invalid for failure to file an environmental impact statement. That statement has not yet been filed. Nor can it be predicted now whether the Secretary, after such a statement, will again approve the lease.

3. The court of appeals held that the federal respondents were acting within the scope of their authority in approving the lease and were therefore immune from personal liability. Petitioners argue (Pet. 17-19) that they have properly alleged *ultra vires* acts by the federal defendants and that dismissal was therefore inappropriate. While well-pleaded complaints are generally accepted as true on a motion to dismiss, such is not the case for unjustified deductions of fact, conclusions of law, and mere unfounded pronouncements of fact or law. *Pacific States Co.* v.

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[2]The court of appeals stated (Pet. App. B, pp. 4-5):

> In considering the first factor, we conclude that the Pueblo would be prejudiced by a judgment in its absence. If the lease is cancelled it would lose its rental income to be derived therefrom, together with employment opportunities for its members. With reference to the second factor, we hold that the above recited prejudice cannot be lessened if the lease is cancelled. Relating to the third factor, we hold that the judgment sought herein would not be adequate in the Pueblo's absence because it may very likely invite additional lawsuits. Under the last factor, we hold that the Tewa has an adequate remedy available, i.e., bringing the dispute before the tribal council of the Pueblo for determination.
> * * *

White, 296 U.S. 176, 184-186; *Oppenheim* v. *Sterling*, 368 F.2d 516, 520 (C.A. 10), certiorari denied, 386 U.S. 1011. The courts below thus acted within their proper discretion in dismissing petitioners' complaints against the federal officials, particularly since the lack of substance of the charges was emphasized by the Pueblo's decision not to enter the case.[3]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]It is doubtful that these individual petitioners had standing to bring what is essentially a tribal claim. See *United States* v. *Jim*, 409 U.S. 80.